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No. 81-2403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARILYN THRELKELD and DANIEL HANKA,
Appellants,

v.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO,
Appellee,

and

STATE OF MINNESOTA and MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellees.

On Appeal from the Supreme Court of Minnesota

APPELLANTS' REPLY TO MOTION TO DISMISS OF APPELLEES STATE OF MINNESOTA AND MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD

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INTRODUCTION

Pursuant to Rule 16.5 of the Rules of this Court, Appellants Marilyn Threlkeld and Daniel Hanka file this brief in reply to the motion to dismiss of Appellees State of Minnesota and Minnesota Public Employment Relations Board.

ARGUMENT

Appellees contend that the issues Appellants raise are not "of sufficient constitutional dimension or merit to warrant * * * consideration by this Court"[1] because:

> (i) "the amended Minnesota fair share fee statute limits the * * * assessment to 85% of regular membership dues even if the union's expenditures related to collective bargaining exceed 85% of its total costs";[2]
>
> (ii) "the Minnesota statute goes beyond [the] constitutional standard in protecting the rights of dissenting employees by prohibiting unions from assessing nonmembers any costs used to provide [collective-bargaining] benefits available only to union members";[3]
>
> (iii) "the residuum approach fully complies with this Court's definition of the substantive inquiry to be pursued to determine the appropriate amount of the * * * fair share fee";[4]
>
> (iv) * * * "the statute places the burden of establishing the appropriate amount of the service fee on the exclusive representative";[5]

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[1] Motion to Dismiss of Appellees State of Minnesota and Minnesota Public Employment Relations Board (M.) at 22 (footnote omitted).

[2] *Id.* at 16.

[3] *Id.* at 17.

[4] *Id.* at 18.

[5] *Id.*

(v) the "residuum theory" involves no irrebuttable presumption;[6] and

(vi) the statute does not delegate exclusive representatives a power of "private taxation".[7]

None of these claims can withstand analysis.

First, that the "statute limits the * * * fee assessment to 85% of regular membership dues" is irrelevant here, where Appellant Robbinsdale Federation of Teachers (RFT) did not establish that *any* percentage of its expenditures defrayed the costs of legitimate collective-bargaining activities.[8]

Second, that the statute precludes the RFT from assessing "members-only benefits" against Appellants, even though such benefits might relate to its duties as exclusive representative, is also irrelevant. The Constitution permits the RFT to impose fees solely for those services that Appellants themselves actually receive; it precludes any charges to finance benefits that accrue uniquely to others, whether or not those benefits relate to collective bargaining. Moreover, focussing on "members-only benefits" begs the basic issue: namely, "What

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[6] *Id.* at 23-24.

[7] *Id.* at 24-25.

[8] Indeed, the "limitation" is never relevant to dissenting employees. If the "fair-share fee" contains *any* assessment for costs that are not collective-bargaining in nature, it violates the employees' constitutional liberties, notwithstanding that it may be "only" 85% of the representative's regular membership-dues. The size of the dues, after all, has no independent constitutional significance, and certainly gains none by being multiplied by an arbitrary statutory percentage.

specific *collective-bargaining* services did the RFT provide Appellants?" That the RFT may have performed a service for all members of its bargaining-unit, Appellants included, does not logically imply that that service properly related to "collective-bargaining, contract administration, and grievance adjustment".[9] Only by identifying and examining each alleged service can an agency or court rationally determine the existence *vel non* of the constitutionally necessary relationship.

Third, this Court has never adopted, sanctioned, or even suggested the "residuum theory" as the standard for the "substantive inquiry" in agency-fee cases. To be sure, if the RFT had identified *all* of its activities *A, B, C, . . . , Z*; and had shown with clear and convincing evidence that activities *D, E, F, . . . , Z* were collective-bargaining in nature—then (and only then) it could have calculated the "fair-share fee" *either* by subtracting the costs of *A, B,* and *C* from its total expenditures and dividing the remainder by the number of employees in the unit,[10] *or* by adding the costs of *D, E, F, . . .* , and *Z* and performing the division. However, where (as here) the RFT identified *only* activities *A, B,* and *C,* any further calculation was logically impermissible. Appellees misrepresent the situation when they claim that, "[u]nder the residuum approach, the sum of expenditures for activities unrelated to collective bargaining and expenditures for benefits available only to union members is deter-

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[9] This, and this alone, is the applicable standard under Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225-26 (1977) (opinion of Stewart, J.).

[10] *See* M. at 18.

mined".[11] The "residuum approach" *might* derive the total costs of "members-only benefits" *if* the representative honestly disclosed all such costs to employees unable to establish the truth of the matter themselves through discovery. However, except in the unlikely circumstance (not proven here) that spending on "members-only benefits" by happenstance includes all "expenditures for activities unrelated to collective bargaining", the "residuum approach" can never derive the latter, because it licenses the representative to collect a fee without disclosing any of its activities other than "members-only benefits", their relation to collective bargaining, or their cost.[12]

Fourth, that the statute imposes a "burden" on the representative to show its expenditures for "members-

---

[11] *Id.* at 21.

[12] Appellees claim this Court has held that, where dissenting employees object to a representative's expenditure of agency fees on political activism, a proper approach is to determine the amount of the representative's political expenditures, and thereafter reduce the fees by this amount, permitting the representative to retain the remainder. *Id.* at 17-21. Such a procedure might be acceptable where the employees objected only to political expenditures, and had access to judicially supervised discovery, as they did in all the cases Appellees cite. In practice, however, it still would not amount to the "residuum theory" Minnesota has adopted. To be sure, all expenditures the representative itself labelled "political" would be excludable from the fee, without any further inquiry. But surely undefined activities the representative arbitrarily lumped within amorphous, non-descriptive categories such as "salaries", "administrative costs", "contingency funds", and so on would not be free from scrutiny to determine if they actually involved "political" matters. Admitting *some* "political" spending would not entitle the representative to a conclusive presumption that all its other, *unspecified* costs were necessarily "non-political" in nature.

only benefits" is irrelevant, even if it were true, which it is not in this case.[13] A "burden of proof" is significant only if the facts proved are material. Proof of "members-only benefits" does not logically equate with proof of collective-bargaining costs. Therefore, the "burden" of proving the former fails to satisfy the constitutional requirement of proving the latter.

Fifth, on its face the "residuum theory" certainly does embody an irrebuttable presumption that every activity of the RFT other than provision of "members-only benefits" is a constitutional collective-bargaining service. The amended statute imposes on Appellants a duty to pay "a fair share fee * * * in an amount equal to the regular membership dues of the exclusive representative, less the costs of benefits financed through the dues and available only to members of the * * * representative", up to 85% of those dues.[14] Thus, for a stark example certainly not excluded by the record in this case, if the RFT expended *no* monies on collective bargaining in a particular year, and less than 15% of its income on "members-only benefits", the statute nevertheless would require Appellants to pay fees equal to 85% of dues, and would preclude them from arguing that the fees are illegal under Minnesota law because

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[13] Testifying on the RFT's "fair-share" exactions under the original statute, its treasurer admitted that the organization's exhibits did not indicate the total expenditures for "members-only benefits", because they failed to reflect the costs of salaries and administrative expenses incurred in providing those benefits. Transcript of Hearing of Wednesday, 1 February 1978, before Hearing Officer Viola M. Kanatz, Minnesota Bureau of Mediation Services, at 81-86.

[14] Minn. Stat. § 179.65, subd. 2, *as enacted in* 1976 Session Laws of Minnesota, ch. 102, § 2.

they did not finance bargaining activities. In short, by licensing the RFT to extract fees without proof of any relationship to collective-bargaining costs, the statute embodies a conclusive legislative presumption that *any* fee excluding charges for "members-only benefits" is valid.

Sixth and last, as applied here, the statute self-evidently delegates a power of taxation to the RFT, a private group. Minnesota has provided the RFT with a statutory mechanism to compel certain private citizens to pay it fees for alleged services. Therein lies a delegation of power. As a matter of state law, the statute does not require the RFT to establish that the fees recompense it for services "which * * * besto[w] a benefit on the [payers], not shared by other members of society".[15] Therein lies a delegation of the power of taxation.[16]

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[15] National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340-42 (1974).

[16] Appellees argue that, because the RFT is not part of the government of Minnesota, a "fair-share fee" cannot be a "tax", by definition. M. at 24-25. Of course, this misses the point. Appellants describe these fees as "taxes" because they have no demonstrated relationship to services Appellants have received from the RFT, yet are exacted under color of law, purportedly in payment for the RFT's statutory activities as exclusive representative. If the Minnesota Legislature permitted a governmental agency to impose such payments, they would be "taxes", strictly so-called, but would be invalid as an unconstitutional delegation of legislative power. Here, where the Legislature permits a private party to impose the payments under aegis of statute, apparently Appellees would have this Court rule: (i) that the payments should be euphemistically labelled "exactions", not "taxes"; and (ii) that the Legislature may allow such private "exactions", even though it may not allow a governmental agency to do exactly the same thing when the pay-

CONCLUSION

This Court should deny Appellees' motion to dismiss, assume jurisdiction, and set this case down for full briefing and oral argument.

Respectfully submitted,

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ments are called "taxes"! Constitutional issues, however, turn on substance, not labels. *E.g.*, City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 174 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 269 & nn.7-12 (1964).